

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2)(b))

Description of Case

S.A. No. 39 of 2006

Date of decision:- 29-6-2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date:- 29-6-2006

Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Second Appeal No. 39 of 2006

M/s Ashoka Bearing Enterprises
Bhalla Mansion
43, Shardhanand Marg
Delhi 110006
Through partner
Ashok Kumar Chitlangya Appellant
Versus

1. M/s Kishan Sahkari Chini Mills Ltd.
Sitarganj, Nainital
Through its
Secretary/General Secretary
2. M/s Delhi U.P. Tempo Service
20 Kamla Market
New Delhi 110002 ...Respondents

Hon'ble J.C.S. Rawat, J.

1. The second appeal has been preferred under section 100 CPC by the defendant No.1 against the judgment and order dated 01.03.2006 passed by the Addl. District Judge, Haldwani, District Nainital in civil appeal No. 67/2001.

2. Brief facts of the case are that the plaintiff-M/s Kishan Sahkari Chini Mills Ltd. filed a original suit against the defendants i.e. Ashoka Bearing Enterprises and Delhi U.P. Tempo Service alleging therein that the plaintiff is a cooperative institution and the defendant-M/s Ashoka Bering Enterprises is a partnership firm dealing in sale and purchase of the bearings all over the country and the defendant no. 2-M/s Delhi U.P. Tempo Service is a transport carrier. It was further alleged that on 17.01.1991 the plaintiff-Kisan Sahakari Chili Mills Ltd. (respondent no.1) has ordered the defendant no.1-M/s Ashoka Bearing Enterprises to supply of bearings worth Rs. 77,208.78 paise. The defendant no. 1 had to

supply the same as early as possible. In pursuance of the said order the bills were sent through the Bank for receiving the payment against the bills. The respondent No. 1- plaintiff released the payment to the appellant through its banker on 08.03.1991 and received all the documents pertaining to the title of the goods sent through carrier-respondent no. 2 But, the said goods was not received to the plaintiff-respondent no.1 and he gave a notice to the defendant-appellant to deliver the goods immediately. When the said amount was not paid the said suit was filed.

3. In response of the said suit, a written statement was filed by which it was alleged that the goods were handed over to the carrier (respondent no. 2) and carrier was the agent of the byer and as such the appellant had no responsibility for the same. It was further alleged that the goods were handed over to respondent no. 2 in good faith for the delivery to the respondent no.1-plaintiff. It was further alleged that the plaintiff had adjusted a sum of Rs. 49,229/- against the alleged outstanding bills.

4. In replication, the plaintiff stated that he tried to adjust the amount but the defendant did not agree. Both the courts below had come to the conclusion that the order was placed by the plaintiff to the defendant no. 1 and it was also held by the court below that the said goods were never received by the plaintiff. Both the courts below held that the goods had to be delivered at Sitarganj the goods were not handed over at Sitarganj by the defendant no. 1 according to the contract. The defendant never claimed any set off of Rs. 49,229/- in his written statement as provided under the CPC. As such, he is not entitled to get the set off. It was further held that the suit is not time barred and

the court of Civil Judge, Nainital had the jurisdiction to hear and decide the said suit.

5. I have heard the learned counsel for the appellant at length and perused the record.

6. It was contended that the trial court erred in holding that the respondent no.2(carrier) was the agent of respondent no.1-plaintiff. He further relied upon the provisions of section 39 of the Sales & Goods Act. The person who was supplying the goods had to make the delivery in conformity with the contract. DW1 has stated in his cross examination that the goods which was purchased by them had to be delivered at Sitarganj. Thus, it was the contract in between the parties that the goods had to be delivered at Sitarganj. As such, the carrier was the agent of the defendant. The concurrent findings of both the courts below are not erroneous. It was further contended that the findings of the courts below are perverse and the courts below had not considered the claim of the adjustment as has been admitted by the plaintiff himself in his letter. It is pertinent to mention here that in the replication the plaintiff had disputed that the defendant no.1 did not agree for the adjustment of the said amount due against the plaintiff had as such the said amount was not adjusted. Perusal of the impugned judgment reveals that there is no perversity in the appreciation of the evidence. I am completely in agreement with the findings recorded by the courts below. I do not want to restate the effect of the evidence or reiterate the reasons given by the courts below. Both the courts below have given the concurrent findings. The expression of general agreeing with reasons given by the courts below, decision of which is under appeal, would ordinarily suffice. **{See Girijanandini Devi Vs.**

Bijendra Narain Choudhary AIR 1967 SC p/1124 and Santosh Hazari Vs. Purushottam Tiwari AIR 2001 SC p965}

7. The High Court cannot proceed to re-appreciate the evidence. Even if the findings recorded by both the courts below were wrong, the findings of fact cannot be disturbed without coming to the conclusion that the findings recorded by the courts below were perverse i.e. misreading of evidence or based on no evidence. In the instant case the findings recorded by the trial court are not perverse.

8. The Hon'ble Supreme Court has held in **Santosh Hazari** (supra) that :-

“We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts, pure findings of fact remain immune from challenge before the High Court in second appeal. Now, the first appellate court is also a final court of law in that its decision on a question of law even if erroneous may not be vulnerable before the High Court in the second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one.”

9. It has also been held in **Rajeshwari Vs. Puran Indoria 2005(7) SCC p/60** that :-

“8. Before parting, we feel that we would be justified in pointing out that the

amendment brought to section 100 of the Code w.e.f. 1.2.1977 by Act 104 of 1976, has really not advanced the cause of justice. Earlier, interference could be had under section 100 of the Code if the decision was contrary to law or some usage having the force of law; or the decision had failed to determine some material issue of law or usage having the force of law; or suffered from substantial error or defect in the procedure provided by the Code or any other law for the time being in force, which may possibly have produced the error or defect in the decision of the case upon the merits. The provision enabled the court to correct the errors of law or of procedure in an appropriate case and even unreasonable appreciation of evidence could have been brought within the contours of error of law in the circumstances of a given case. But by introducing the concept of "substantial question of law" in section 100 CPC, the right of the litigant to have a decision after a reappraisal of the relevant materials by the High Court has been curtailed. Though courts of first appeal are made the final courts of facts, there are instances when the first appellate courts merely, mechanically confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case. Since a judgment of affirmance need not be as elaborate as a judgment reversing the decision of the court below, it is often contended that the judgment of the appellate

court satisfies the requirements of Order 41 Rule 31 of the Code. There are occasions when the High Court feels the constraint of section 100 and reluctantly declines to interfere though interference would have been proper to render justice between the parties. The High Court are often confronted with an argument that even if what was involved was a mixed question of fact and law or even a question of law, that did not constitute a substantial question of law justifying interference under section 100 of the Code. Why cannot an error of law committed by the appellate court be corrected in the second appeal? Why should not a litigant have an opportunity of having the decision in his case corrected for an error of law by the High Court at the second appeal stage? When a substantial question of law as expounded by this Court is only an open question of law substantial as between the parties, a restoration of the position as it existed prior to 01.02.1977 does not appear to be reopening of the door too wide."

10. In view of the above, I would like to indicate that all questions of law or fact or a mixed question of law and fact cannot be the substantial question of law. It is a well settled position of law that the scope of exercise of the jurisdiction by the High Court in second appeal under section 100 is limited to be substantial questions of law. It was observed in Santosh Hazari case (supra) that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial

question of law. To be a “substantial” question of law it must be debatable, not previously settled by the law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the court. As to what would be the question of law “involving in the case” it was observed that to be a question of law “involving in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of fact and it must be necessary to decide that question of law for the just and proper decision between the parties. The jurisdiction of the High Court had been curtailed to correct the errors of law or the erroneous findings of fact of courts below even on question of law unless such question of law be a substantial one.

11. In view of the foregoing discussion, I am of view that no substantial question of law arises for consideration in the present appeal. The appeal devoids of merit and is liable to be dismissed. Accordingly, the appeal is dismissed in limine. All the pending miscellaneous application(s) in this case, if any, shall stand disposed of accordingly.

(J.C.S. Rawat, J.)

Dated 29.06.2006

LSR